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WORKMEN'S COMPENSATION AND THE CONFLICT  
OF LAWS

BY RALPH H. DWAN\*

LITIGATION arising out of the application of Workmen's Compensation Acts<sup>1</sup> during the last two decades has written a new chapter in Anglo-American conflict of laws. During the last fifteen years, workmen's compensation legislation has swept this country. Few states have failed to embark upon this social experiment.<sup>2</sup> Almost every new session of the various legislatures brings more or less important changes.

The possible questions are large in number. This paper merely purports to deal with those which have arisen in English and American reported cases. It is proposed to organize and classify the available material<sup>3</sup> with some few comments.

I. IS A COMPENSATION AWARD IN ONE STATE ENTITLED TO  
FULL FAITH AND CREDIT IN OTHER STATES?

Certain phases of this problem already have been raised in the courts. Two recent cases are *Schendel v. Chicago, R. I. & P. Ry. Co.*<sup>4</sup> and *Elder v. Chicago, R. I. & P. Ry. Co.*<sup>5</sup> In both, the decedent was killed in Iowa.<sup>6</sup> In the *Schendel Case*, an action was brought in the state district court of Minnesota under the federal Employer's Liability Act. Shortly thereafter, the defendant insti-

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<sup>1</sup>Hereafter, except in quotations, the term Act will be used to mean Workmen's Compensation Act unless otherwise qualified.

<sup>2</sup>On December 1, 1925, there were Acts in forty-two states and three territories. Jones, *Workmen's Compensation Laws in the United States and Territories*, published by the Workmen's Compensation Publicity Bureau, 9th ed., p. 5. Since then, an act has come into effect in Missouri. See Bulletin No. 423 of the United States Bureau of Labor Statistics 306.

<sup>3</sup>No systematic attempt has been made to follow up any statutory changes which may have been made since the last reported decision in a particular jurisdiction. Likewise, such statutes as are cited have been followed up only to the extent of the means available to the writer.

<sup>4</sup>(1925) 163 Minn. 460, 204 N. W. 552.

<sup>5</sup>(1925) 163 Minn. 457, 204 N. W. 557.

<sup>6</sup>The facts of both cases, as stated, are derived from the state reports and from the Supreme Court Reporter.

tuted a proceeding in Iowa under the Iowa Compensation Act for arbitration. In that proceeding, it was answered that the decedent was employed in *interstate* commerce and that hence the Iowa Act did not apply. The arbitrators found that the decedent was engaged in *intrastate* commerce and made a compensation award. On review by the industrial commissioner, the award was approved. On appeal to the Iowa district court, final judgment was entered affirming the award. Thereafter, the action in the Minnesota district court was heard, and, in spite of a plea of *res judicata*, judgment was rendered for the plaintiff. The facts in the *Elder Case* were practically the same except that after the award in the Iowa proceedings, there had been an application under the Iowa Act for a review by the industrial commissioner and no action had been taken upon that application when the judgment was rendered in the Minnesota district court. From both judgments, there was an appeal in which the action of the Minnesota district court in refusing to give effect to the Iowa judgment and decision was assigned as error and challenged as denying them the full faith and credit enjoined by the federal constitution.<sup>7</sup> The Minnesota supreme court affirmed both judgments. On certiorari, the United States Supreme Court<sup>8</sup> reversed the judgment in the *Schendel Case*, but affirmed the judgment in the *Elder Case*. The decision in the *Elder Case* was based upon the fact that the Iowa decision had not ripened into an enforceable award.

It is of importance to notice that the United States Supreme Court expressly refused to pass upon the effect of the Iowa award in the *Elder Case* if it *had* become an enforceable award upon review by the industrial commissioner. In the *Schendel Case*, there was a judgment in an Iowa court of record.

Is, then, an enforceable award under a Compensation Act entitled to full faith and credit even though the award was made by an administrative tribunal and not reduced to judgment in a court of record? The cases just discussed do not pass upon that question. However, there would seem to be no valid reason for not so holding if the award satisfies the requisites which a judgment must satisfy to be entitled to full faith and credit. In fact, such faith and credit was given to an award of the Texas Industrial Accident Board in a New York case.<sup>9</sup>

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<sup>7</sup>Art. 4., sec. 1.

<sup>8</sup>(1926) 46 Sup. Ct. 420.

<sup>9</sup>In *re Phillips*, (1923) 206 App. Div. 314, 200 N. Y. S. 639.

II. WILL A RIGHT TO COMPENSATION ARISING UNDER THE ACT  
OF ONE JURISDICTION BE ENFORCED DIRECTLY IN  
ANOTHER JURISDICTION?

The nature of this problem has been stated clearly by Judge Kenyon in these words:<sup>10</sup>

"Is the right of compensation created by the state . . . in its Workmen's Compensation Law so inseparable from and united with the remedy provided as to make its enforcement in a particular method and in a particular tribunal necessary? Its solution requires consideration of the statutes involved."

The possibilities of enforcement in other jurisdictions under a certain type of Act are shown by two recent federal cases: *Lindberg v. Southern Casualty Co.*,<sup>11</sup> and *Texas Pipe Line Co. v. Ware*.<sup>12</sup> In both cases, an action was brought in another jurisdiction to enforce a right of recovery under the Louisiana Act and in both cases the action was successful. In the *Lindberg Case*, the court tersely said:

"I have examined the act and find that it gives a transitory action in the nature of a contractual right cognizable in any court having jurisdiction of the parties, and that there is nothing in it which presents any difficulty in examining and enforcing the claim."

More adequate treatment of the matter is given in the *Ware Case*. In his opinion, Judge Kenyon, after stating the real question (as above quoted), pointed out that the remedy provided under the Louisiana Act is in the regular courts. He admitted that there may be some few provisions of the Act which might be carried out more easily in the courts of Louisiana but did not regard such difficulties as insuperable. In fact, as the court pointed out, if the right created possesses the necessary characteristics of a transitory cause of action, any attempt by the legislature to restrict its enforcement to that state would be abortive.<sup>13</sup>

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<sup>10</sup>*Texas Pipe Line Co. v. Ware*, (C.C.A. 8th Cir 1926) 15 F. (2d) 171, 173.

<sup>11</sup>(D.C. Tex. 1926) 15 F. (2d) 54.

<sup>12</sup>(C.C.A. 8th Cir. 1926) 15 F. (2d) 171.

<sup>13</sup>*Tennessee Coal Co. v. George*, (1914) 233 U. S. 354, 34 Sup. Ct. 587, 58 L. Ed. 997, L. R. A. 1916D 685.

This makes quite inexplicable an earlier federal case, *Martin v. Kennecott Copper Corporation*, (D.C. Wash. 1918) 252 Fed. 207. In that case, recovery under the Alaska Act was denied because of provisions in the Act that the action should be brought only in the courts of the territory.

In another recent federal case, an action against the insurer under the Oregon Act in the federal district court for the district of Oregon was successful, and was sustained on appeal. No objection appears to

Judge Kenyon was careful to distinguish this case from cases involving an Act under which the remedies are before an administrative tribunal. The leading case involving such a situation is *Logan v. Missouri Valley Bridge and Iron Co.*,<sup>14</sup> where an unsuccessful attempt was made to recover in Arkansas on a claim arising under the Oklahoma Act. The court stated that there were no judicial processes in Arkansas that could be adapted to the enforcement of the provisions of the Oklahoma Act. A like holding and similar reasoning is found in a recent case in North Carolina.<sup>15</sup> The inference is that the result might be different if there were substantially similar administrative processes available in the forum.

### III. WHEN DOES THE LOCAL ACT APPLY? HEREIN OF THE SO-CALLED EXTRA-TERRITORIAL OPERATION OF THE ACTS

Under this heading it is proposed to discuss only a limited class of cases, viz., those where the sole conflict of laws question is whether the local Act applies under the facts.<sup>16</sup>

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have been taken to the jurisdiction of the court. *Zurich General Accident & Liability Insurance Co. v. Brunson*, (C.C.A. 9th Cir. 1926) 15 F. (2d) 906.

<sup>14</sup>(1923) 157 Ark. 528, 249 S. W. 21.

Like holdings are: *Lehmann v. Ramo Films Inc.*, (1915) 92 Misc. 418, 155 N. Y. S. 1032; *McCarthy v. McAllister Steamboat Co.*, (1916) 94 Misc. 692, 158 N. Y. S. 563; *Verdicchio v. McNab & Harlin Mfg. Co.*, (1917) 178 App. Div. 48, 164 N. Y. S. 290.

In *Pensabene v. F. & J. Auditore Co.*, (1913) 155 App. Div. 368, 140 N. Y. S. 266, motion for leave to appeal denied in 156 App. Div. 888, 140 N. Y. S. 1134, a suit was brought in New York on a claim under the New Jersey Act. Recovery was denied on the ground that the New Jersey Act only purported to apply when the contract of hiring was made in New Jersey, and that no such hiring was set up in the complaint.

In *Mosely v. Empire Gas and Fuel Co.*, (Mo. 1926) 281 S. W. 762, 45 A. L. R. 1223, an action in Missouri based upon the Kansas Act was unsuccessful. The court said (281 S. W. 762, 768):

"By that statute the right and remedy are so united, and the provision for liability is so coupled with a provision for a special remedy to be administered by a designated tribunal with certain specific powers given, that the remedy must be sought in the designated tribunal."

Cf. an earlier Missouri case, the reasoning of which is less supportable. *Harbis v. The Cudahy Packing Co.*, (1921) 211 Mo. App. 188, 241 S. W. 960, certiorari quashed, (1922) 292 Mo. 333, 238 S. W. 809.

<sup>15</sup>*Johnson v. Carolina, etc., Ry. Co.*, (N.C. 1926) 131 S. E. 390, 394.

<sup>16</sup>Much has been written upon this question. See particularly: *Angell*, *Workmen's Compensation for Injury Abroad*, 31 Harv. L. Rev. 619; 37 Harv. L. Rev. 375; 22 Columbia L. Rev. 263; 30 Yale L. Jour. 71; 21 Mich. L. Rev. 449; 9 Calif. L. Rev. 230; 7 Iowa L. Bull. 166; 3 Neb. L. Bull. 295; *Bradbury*, *Workmen's Compensation*, 3rd ed., chap. VII, p. 82; 1 *Honnold*, *Workmen's Compensation*, 32, sec. 8; 20 N. C. C. A. 621; 45 A. L. R. 1234.

The cases often stress the fact that a particular Act is "elective"<sup>17</sup> or is "compulsory." The meaning of this classification and the extent and scope of the two classes is expressed as of July 1, 1926 by a bulletin of the United States Bureau of Labor Statistics<sup>18</sup> as follows:

"In most states (32) the employer and employee may exercise a choice as to accepting the provisions of the compensation law. Election by the employer is presumed in a majority of the states, but in 10 positive action is required. Where the employer rejects the law, actions for damages may be brought without the customary common-law defenses. Where he elects to accept the provisions of the law, the acceptance by the employee is taken for granted, in the absence of rejection, except in Kentucky, where positive acceptance is required. In New Hampshire the employee may make his choice of remedy after the injury has been received. If the employer has accepted and the employee rejects the law, actions for damages are subject to the common-law defenses, except in 2 states (New Jersey and Pennsylvania), where the defenses are abrogated absolutely.

"The laws are compulsory in 14 states, neither employer nor employee having the option of choosing another remedy, except in Arizona, where a workman may elect prior to the injury not to come under the act. Suit is permitted in a number of states if the employer has failed to insure or permits premiums to remain unpaid."

The importance sometimes attached by the courts to the distinction between these two types of Acts justifies some discussion of the matter. In view of the coercion exercised upon both the employer and employee in most of the "elective" Acts by the juggling of the common-law defenses, it was early seen by commentators on the subject<sup>19</sup> that such Acts were elective in form only and that such form was used to escape a fancied constitutional difficulty. Such Acts have been characterized as "pseudo-elective" and as being "a piece of legislative trickery."

In the subsequent discussion, it will be seen that the word "extraterritorial" is often used with reference to the operation of the Acts in some of the cases. If all that is meant is that a certain Act has been applied to accidents occurring outside the

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As to the English law, see Elliott, *Workmen's Compensation Acts*, 8th ed., p. 2; Knowles, *Law Relating to Workmen's Compensation*, 4th ed., p. 8.

<sup>17</sup>Sometimes called "optional."

<sup>18</sup>Bulletin No. 423, *Workmen's Compensation Legislation of the United States and Canada* as of July 1, 1926. The excerpts are from pp. 9, 10.

<sup>19</sup>See Smith, *Sequel to Workmen's Compensation Acts*, 27 *Harv. L. Rev.* 235, 248, 249 and footnotes.

state, the term is at least descriptive. But the use of the term is unfortunate because of its other meaning, viz., the application of the law of a state to matters which had no connection with such state. Few if any of the cases involved such a situation.

What is the nature of this problem? Under the Act of a given jurisdiction, the liability of the employer has been subjected to radical change. Under what circumstance does the Act apply? If the Act is explicit on the matter, there is no difficulty. There can be no doubt that the legislature has the power, aside from possible constitutional limitations, to attach legal consequences to any acts done within or, indeed, without its territorial limits.<sup>20</sup> The courts of that jurisdiction, at least, must heed such legislative mandates. The difficulty arises when the Act contains little or no provision for this matter. Then the Act must be interpreted. It is not only possible but in accord with common-law principles for the court to turn to common-law analogies to aid it in this task of adding a judicial gloss to the Act if such analogies are sufficiently close. Conceivable analogies are the conflict of laws rule as to what law governs tort liability, or the rules as to what law governs the contract of employment, or, better, the common-law tradition of imposing certain incidents upon the relation of master and servant<sup>21</sup> when the state has a sufficient interest in that relation.

To show how the courts have attacked this problem, a few typical cases will be discussed in some detail.

First, an illustration of the efficacy of explicit legislative provision on this matter is found in a California case, *Quong Ham Wah Co. v. Industrial Acc. Comm.*<sup>22</sup> The Act provided:

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<sup>20</sup>See concurring opinion of Olney, J., in *Quong Ham Wah Co. v. Industrial Acc. Comm.*, (1920) 184 Calif. 26, 44, 192 Pac. 1021, 12 A. L. R. 1190.

<sup>21</sup>See Pound, *The Spirit of the Common Law*, 29-31.

<sup>22</sup>(1920) 184 Calif. 26, 192 Pac. 1021, 12 A. L. R. 1190. Another application of the same provision of the Act is found in *Globe Cotton Oil Mills v. Industrial Acc. Comm.*, (1923) 64 Calif. App. 307, 221 Pac. 658.

A similar statute was given a like construction in *Pickering v. Industrial Commission*, (1921) 59 Utah 35, 201 Pac. 1029. See also *Home Life & Accident Co. v. Orchard*, (Tex. Civ. App. 1921) 227 S. W. 705; *Empire Glass, etc., Co. v. Bussey*, (1925) 33 Ga. App. 464, 126 S. E. 912.

In *Smith v. Van Noy Interstate Co.*, (1924) 150 Tenn. 25, 262 S. W. 1048, 35 A. L. R. 1409, noted in 34 Yale L. Jour. 453, the contract of employment was made in Tennessee for work outside the state; the injury occurred outside the state. The Act specifically provided for compensation for injuries abroad when there would be compensation had the accident happened in Tennessee if the contract of employment was made in Tennessee unless otherwise expressly provided in such contract. Yet, in holding the Tennessee Act to apply the court seemed to disregard this express provision and to base its decision upon a course of reasoning large parts of which were taken, without indicating it, verbatim from a

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where . . . the contract of hire was made in this state . . ."

In affirming an award made under this provision, the court aptly described its operation as follows:<sup>23</sup>

"The contract creates a relationship under the sanction of the law and the same law attaches as an incident thereto an obligation to compensate for injuries sustained abroad amounting to a sort of compulsory insurance. The legislature may lawfully impose that right and duty upon those operating under a contract subject to the legislative power, and no principle of law is defeated by attaching to such contracts the same duties and rights as incidents to acts abroad that are lawfully imposed as incidents to the same acts occurring within the geographical limits of the state."

Likewise, the English Act provides for compensation for injuries abroad in certain occupations,<sup>24</sup> and such provisions have been applied.<sup>25</sup>

Where the Act is not explicit on this matter, the decisions show much contrariety of opinion. Cases illustrating the various views will be discussed. Because of the advantages in tracing the development of a line of thought, the cases in a particular jurisdiction will be treated chronologically, as far as may be.

The English cases uniformly hold that the compulsory English Act does not apply to injuries abroad, in cases where there is no express provision in the Act for such application. The leading English case is *Tomalin v. S. Pearson and Son, Ltd.*<sup>26</sup> in which

Michigan case where no such express statutory provision was involved. *Crane v. Leonard, Crossette & Riley*, (1921) 214 Mich. 218, 183 N. W. 204, 20 N. C. C. A. 621, cited *infra* note 34.

<sup>23</sup>184 Calif. 26, 36, 192 Pac. 1021, 12 A. L. R. 1190. The court used as to the liability imposed the unfortunate term "*quasi ex contractu*."

The California court previously had held that the "compulsory" California Act, before this provision was inserted, did not apply when the injury occurred outside the state. *North Alaska Salmon Co. v. Pillsbury*, (1916) 174 Calif. 1, 162 Pac. 93, L. R. A. 1917E 642.

<sup>24</sup>Edw. 7, c. 58, sec. 7 extended the operation of the Act to seamen injured abroad. By the Amending Act of 1923, 13 and 14 Geo. V. ch. 42, sec. 27, the Act may be extended by order to crews of aircraft abroad. Such an order has been made. See Elliott, *Workmen's Compensation Acts*, 8th ed., p. 691.

<sup>25</sup>See Bradbury, *Workmen's Compensation*, 3rd ed., p. 83.

<sup>26</sup>[1909] 2 K. B. 61, 78 L. J. K. B. 863, 100 L. T. R. 685, 25 T. L. R. 457, 2 Butterworth's W. C. C. 1.

An earlier case in the Dover County Court used a different method of reasoning. *Hicks v. Maxton*, (1907) 124 L. T. Jour. 135, 1 B. W. C. C. 150. There the contract of employment was made in England and the injury occurred in France. The court, purporting to use the test of the intention of the parties, said that the *lex loci solutionis*, not the *lex loci contractus* should govern.



the contract of employment was made in England and the injury resulting in death occurred in Malta. The widow sought compensation. The Act was held not to apply. The court pointed out that the widow was not a party to the contract and hence was simply claiming performance of a statutory duty, but went on to find that the Act was not intended to operate beyond the territorial limits of the United Kingdom. This finding was based partly upon the presumption<sup>27</sup> that extraterritoriality was not intended by Parliament, and partly upon provisions of the Act expressly extending the operation of the Act to seamen injured abroad.<sup>28</sup>

A similar result was reached in the first case in this country involving a claim for compensation for an injury occurring outside the state. In *Gould's Case*,<sup>29</sup> the Massachusetts court took the same starting point that the English courts have taken, *viz.*,

"In the absence of unequivocal language to the contrary, it is not to be presumed that statutes respecting this matter are designed to control conduct or fix the rights of parties beyond the territorial limits of the state."

One of the reasons given by the court for its decision was that to hold otherwise would "give rise to many difficult questions of conflict of laws." This view has been called, somewhat inaptly, the "tort theory." It has had small following in this country.<sup>30</sup>

In cases taking other views, importance frequently is attached to the "elective" or "compulsory" features of the Act involved.

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The Tomalin case has been followed in *Schwartz v. India Rubber, etc., Co.*, [1912] 2 K. B. 299, 81 L. J. K. B. 780, 106 L. T. R. 709, 28 T. L. R. 331, 5 B. W. C. C. 390. Dicta supporting the Tomalin case are found in: *Krzus v. Crow's Nest Pass Coal Co., Ltd.*, [1912] A. C. 590, 597, 81 L. J. P. C. 227, 107 L. T. R. 77, 28 T. L. R. 488, 6 B. W. C. C. 271; *Hunter v. Stadtische Hochseefischerei, etc.*, [1925] 2 K. B. 493, 507, 18 B. W. C. C. 235.

It is true that the cases, except *Hicks v. Maxton*, do not cover the situation where the workman hired in Great Britain is himself seeking compensation for injuries abroad, but the textwriters take it to be settled that the Act does not apply to injuries abroad save in the enumerated exceptions. Knowles, *Law Relating to Workmen's Compensation*, 4th ed., p. 8; Elliott, *Workmen's Compensation Acts*, 8th ed., p. 2.

<sup>27</sup>The court cited Maxwell, *Interpretation of Statutes*, 213.

<sup>28</sup>See note 24, *supra*.

<sup>29</sup>(1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D 372, 4 N. C. C. A. 60.

This case was followed in *Lemieux v. Boston & Maine R. R.*, (1914) 219 Mass. 399, 106 N. E. 992.

<sup>30</sup>A similar view was taken in California prior to its statutory changes. See note 23 *supra*. Likewise, the Illinois Act was at first held not to apply to injuries abroad. *Union Bridge Co. v. Industrial Com.*, (1919) 287 Ill. 396, 122 N. E. 609. Later a provision was inserted in the Act by which it applies to employments outside the state where the contract of hire is made within the state. Ill. Laws, 1925, p. 380, sec. 5.

This distinction already has been discussed to some extent.<sup>31</sup> The cases under the "elective" acts will be considered first.

Largely because of being pioneers, the New Jersey cases have exerted much influence in this field. In *American Radiator Co. v. Rogge*,<sup>32</sup> the contract of employment was made in New York for employment in New York and New Jersey; the injury and death occurred in New Jersey. In holding the New Jersey Act to apply, the court used this language:

"The liability is indeed contractual in character by force of the very terms of the statute, but it is not the result of an express agreement between the parties; it is an agreement implied by the law, of a class now coming to be called in the more modern nomenclature of the books 'quasi-contracts'."

This implied contract was said to be "one of the terms upon which the performance of a foreign contract of hiring shall be permitted in this state."

In a later case involving different facts, the New Jersey court did not qualify its words of contract. In *Rounsaville v. Central R. R. Co.*,<sup>33</sup> the contract of employment was made in New Jersey; the accident happened in Pennsylvania. In holding the New Jersey Act applicable, the court said that the question was the simple one of "whether a New Jersey court will enforce a New Jersey contract according to the terms of a New Jersey statute." In fact, the Act was not explicit on this matter.

This "contract" theory has a wide following.<sup>34</sup> Its history and its complications in Connecticut are of particular interest. In

<sup>31</sup>See text to footnotes 18 and 19.

<sup>32</sup>(1914) 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85, 7 N. C. C. A. 144, noted in 2 Va. L. Rev. 470; affirmed in the court of errors and appeals "for the reasons expressed by Mr. Justice Swayze in the supreme court." 87 N. J. L. 314, 93 Atl. 1083; writ of error to New Jersey supreme court dismissed for want of jurisdiction, 245 U. S. 630, 38 Sup. Ct. 63, 62 L. Ed. 520. This case was followed in *Davidheiser v. Hay Foundry & Iron Works*, (1915) 87 N. J. L. 688, 94 Atl. 309; and in *West Jersey Trust Co. v. P. & R. R. Co.*, (1915) 88 N. J. L. 102, 95 Atl. 753, reversed in 90 N. J. L. 730, 101 Atl. 1055 because interstate commerce involved.

<sup>33</sup>(1915) 87 N. J. L. 371, 94 Atl. 392; reversed in (1917) 90 N. J. L. 176, 101 Atl. 182 because the injury was in interstate commerce.

<sup>34</sup>In the following cases (other than those discussed elsewhere), the "contract theory" was used in holding the local Act applicable when the injury occurred outside the state:

COLORADO—*Industrial Commission v. Aetna Life Ins. Co.*, (1918) 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1336. The court made an interesting admission:

"The very purpose of the provision [denying in negligence cases the defenses of assumed risk, the fellow-servant rule, and contributory negligence] is to induce employers to accept the compensation law, in so denying such defenses. . . ."

Compare that statement with the text to notes 18 and 19.

*Kennerson v. Thames Towboat Co.*,<sup>35</sup> the contract of employment was made in Connecticut for performance partly within and partly without the state. The Connecticut Act was held to apply. Considering the general purpose of the Act and the difficulties which would arise for both the employers and employees if they could not be sure what Act was to apply, the court found the local Act to provide "for compensation arising out of a contract of employment authorized by our Act for injuries suffered without our jurisdiction." In *Douthwright v. Champlin*,<sup>36</sup> the contract of hire was made in Massachusetts. Certain work was to be done in Connecticut and both parties expressly accepted the Connecticut Act. The Connecticut Act was held to apply. The court stressed the fact that the Massachusetts Act, under the holding in *Gould's Case*,<sup>37</sup> did not apply to injuries outside of the state. It is of interest to notice the dictum of the court that the result would have been the same without the express acceptance if there had been absence of refusal. Then, said the court, the law would make

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[But recovery under the Colorado Act has been denied when the injury occurred in Colorado but the contract was made elsewhere. *Hall v. Ind. Comm.*, (1925) 77 Colo. 338, 235 Pac. 1073.]

IOWA—*Pierce v. Bekins Van & Storage Co.*, (1919) 185 Iowa 1346, 172 N. W. 191. In this case it was argued (185 Iowa 1346, 1360) that since the Act provided (Iowa Code Supplement 1913, sec. 2477-m 29) that the hearings should be held in the place where the injury occurred, and since they could not be held outside the state, the Act could not apply to injuries occurring outside the state. The force of this argument was denied by the court. The basis for the argument has been removed by express provisions for the place of hearing when the injury occurred outside the state. Iowa Laws 1919, Ch. 220, sec. 8; Iowa Code 1924, sec. 1440.

MICHIGAN—*Crane v. Leonard, Crossette & Riley*, (1921) 214 Mich. 218, 183 N. W. 204; 20 N. C. C. A. 621. This case was followed in *Huls-wit v. Escanaba Mfg. Co.*, (1922) 218 Mich. 331, 188 N. W. 411. The present Act expressly applies to injuries abroad "in those cases where the injured employee is a resident of this state at the time of the injury, and the contract of hire was made in this state . . ." Acts of 1921, No. 173, part III. Query whether the restriction as to residents is constitutional. Cf. *Quong Ham Wah Co. v. Ind. Acc. Comm.*, (1920) 184 Cal. 26, 192 Pac. 1021, 12 A. L. R. 1190.

RHODE ISLAND—*Grinnell v. Wilkinson*, (1916) 39 R. I. 447, 98 Atl. 103, L. R. A. 1917B 767, Ann. Cas. 1918B 618, noted in 1 MINNESOTA LAW REVIEW 531.

WEST VIRGINIA.—*Gooding v. Ott*, (1916) 77 W. Va. 487, 87 S. E. 862, L. R. A. 1916D 637, noted in 3 Va. L. Review 552, 14 Mich. L. Rev. 524. This case was followed in *Foughty v. Ott*, (1917) 80 W. Va. 88, 92 S. E. 143, where the requirement seemed to be made that the employment include work to be done in West Virginia.

<sup>35</sup>(1915) 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A 436. There was also an admiralty question involved in the case.

<sup>36</sup>(1917) 91 Conn. 524, 100 Atl. 97, Ann. Cas. 1917E 512, 15 N. C. C. A. 870, noted in 27 Yale L. Jour. 113.

<sup>37</sup>(1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D 372, 4 N. C. C. A. 60. See text to note 29 *supra*.

the same addition to the contract. In *Banks v. Howlett Co.*<sup>38</sup> as the court construed the facts, the contract was made in New York for services in Connecticut where the injury occurred. Again the Connecticut Act was held to apply. The court said that since the contract was made with specific reference to services in Connecticut, it had incorporated in it automatically the provisions for compensation in the Connecticut Act. The last case was carefully limited to its facts in *Hopkins v. Matchless Metal Polish Co.*<sup>39</sup> There the contract was made in New Jersey contemplating services in Connecticut, Massachusetts, and New York; the injury occurred in Connecticut. The Connecticut Act was held *not* to apply.

In the course of its opinion, the court supported its contract theory against the charge that such a construction prevents a later amendment of the Act from becoming part of the contract. The court answered:

"We think this a misconception of the effect of the election by an employer or employee. His election, as a matter of law, incorporates the provisions of the Act and any subsequent amendments thereto as a part of the contract. No violation of a right of contract can arise out of this, since it is by his own election that the Act and subsequent amendments are incorporated in his contract."

The theoretical difficulties involved in this course of decision in Connecticut were recognized in *Pettiti v. T. J. Pardy Const. Co.*<sup>40</sup> There the contract was made in Connecticut with the "specific and sole subject of that contract being performed in Massachusetts," where the injury occurred. In holding the Connecticut Act to apply, the court expressly overruled the *Banks Case*.<sup>41</sup>

This "contract theory" has led the Indiana courts also into difficulties. In *Carl Hagenback, etc., Shows Co. v. Leppert*,<sup>42</sup> the contract was made in Indiana; the injury occurred in Illinois. The Act expressly provided that with certain exceptions every employer and employee under the Act "shall be bound by the provisions of the Act whether injury . . . occurs within the state or in some other state . . ." Yet, in holding the Indiana Act to apply, the court talked of the right as being contractual. In *Hagenback, etc., Show. Co. v. Randall*,<sup>43</sup> the contract made in

<sup>38</sup>(1918) 92 Conn. 368, 102 Atl. 822, noted in 27 Yale L. Journ. 707.

<sup>39</sup>(1923) 99 Conn. 457, 121 Atl. 828.

<sup>40</sup>(1925) 103 Conn. 101, 130 Atl. 70, noted in 35 Yale L. Journ. 118.

<sup>41</sup>See note 38, *supra*.

<sup>42</sup>(1917) 66 Ind. App. 261, 117 N. E. 531.

<sup>43</sup>(1920) 75 Ind. App. 417, 126 N. E. 501. This case was followed

Ohio expressly provided that with reference to Employer's Liability Acts and other matters, the laws of the District of Columbia should govern the contract; the injury occurred in Indiana. The employer, an Indiana corporation with offices in Indianapolis, was in the show business. The employment was for work in many states including Indiana. The Indiana Act was held to apply. The court pointed out that under the Indiana Act, "acceptance" was presumed in the absence of notice to the contrary, which notice was never given. The court reasoned that the Act expressed the public policy of the state and that the court would not enforce a contract contravening that policy. The court said that the obligation under the Indiana Act was "superimposed upon the Ohio contract as a condition of its performance in this state." In *Darsch v. Thearle Duffield, etc., Co.*,<sup>44</sup> both parties were residents of Illinois where the contract was made; the injury occurred in Indiana while the employee was only temporarily in that state. In holding the Indiana Commission to be without jurisdiction to make an award, the court said that the provisions of the Indiana Act as to presumed acceptance were "intended only to apply to such persons as were residents of this state and made their contracts of employment here, or made such contract[s] with reference to their performance, at least in part, within this state, or maintained an office and place for doing business within this state." In *Johns Manville Inc. v. Thrane*,<sup>45</sup> the contract was made in Illinois or Indiana (the court said it was immaterial) contemplating performance in Indiana, where the injury occurred. The employer was an "Indiana employer;" the employee was an "Indiana employee." In holding the Indiana Act to apply, the court stressed the fact that the contract was to be performed in Indiana. In *Bement Oil Corporation v. Cubbison*,<sup>46</sup> the contract was not made in Indiana, nor was it to be performed there; the injury occurred in Arkansas. The Indiana Act was held not to apply. The court said that the fact that the employer maintained its principal place of business in Indiana and that the employee was a resident of Indiana did not make the Indiana Act applicable, and intimated that to hold it applicable on that basis would violate the "privi-

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in *Hagenback, etc., Show Co. v. Ball*, (1920) 75 Ind. App. 454, 126 N. E. 504.

<sup>44</sup>(1922) 77 Ind. App. 357, 133 N. E. 525. This case was followed in a recent case under similar facts. *Norman v. Hartman Furniture & Carpet Co.*, (Ind. App. 1926) 150 N. E. 416.

<sup>45</sup>(1923) 80 Ind. App. 432, 141 N. E. 229.

<sup>46</sup>(Ind. App. 1925) 149 N. E. 919.

leges and immunities" clause<sup>47</sup> of the federal constitution. To add to the confusion, there is the recent case of *Leader Specialty Co. v. Chapman*.<sup>48</sup> There the contract was made by correspondence, the offer being sent from Indiana and the acceptance being mailed from South Carolina. The work was to be done in Georgia. It does not appear where the injury occurred. In holding the Indiana Board to be without jurisdiction, the court said that the parties might have contracted that their rights be governed by Indiana law, but had not done so; that the presumption is that the contract was made with reference to Georgia law; and that hence the remedy was under the law of Georgia.

This résumé of the use of the "contract theory" in the jurisdictions which have given it its greatest development indicates the ramifications of the theory and some of the absurdities in reasoning to which it has lead. At the risk of repetition, it may be worth while to state some of the reasons why the theory is based upon a fiction. This has been well stated as follows:<sup>49</sup>

"The assent is ordinarily conclusively presumed in the absence of notice to the contrary. Moreover, certain penalties are attached to the election not to adopt the Act. It is still harder to say that the parties agree to accept subsequent amendments. And to work out a consideration for the opportunity usually afforded to one or both parties to withdraw at any time before injury demands more fiction."

Other reasons suggest themselves. For example, the parties cannot contract out of any particular provisions of the Act.

The cases in a few more jurisdictions with "elective" Acts remain to be discussed. Minnesota has developed and followed consistently a theory of its own. In the first case, *State ex rel. Lena Chambers v. District Court*,<sup>50</sup> the contract was made in Minnesota where the business of the employer was centralized; the injury occurred in North Dakota. In holding the Minnesota Act to apply, the court, after mentioning but not stressing the contract obligation arising under the Act, went on to say:

"When a business is localized in a state there is nothing inconsistent with the principle of the compensation Act in requiring the employer to compensate for injuries in a service incident to its conduct sustained beyond the borders of the state."

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<sup>47</sup>Art. 4, sec. 2. Cf. *Quong Ham Wah Co. v. Industrial Acc. Comm.*, (1920) 184 Cal. 26, 192 Pac. 1021, 12 A. L. R. 1190.

<sup>48</sup>(Ind. App. 1926) 152 N. E. 872.

<sup>49</sup>37 Harv. L. Rev. 375, 376. See also Smith, *Sequel to Workmen's Compensation Acts*, 27 Harv. L. Rev. 235, 248.

<sup>50</sup>(1918) 139 Minn. 205, 166 N. W. 185, 3 A. L. R. 1347. For the subsequent history of this case, see (1919) 141 Minn. 348, 170 N. W. 218.

This "localization" theory has been followed in a number of cases.<sup>51</sup> It is of interest to notice, however, that in every case so far the court has been able to find that the business *was* localized in Minnesota. What will be done when a case arises in which such a finding cannot be made remains to be seen.

The courts of Maine<sup>52</sup> and Nebraska<sup>53</sup> have dealt with these questions without adhering to or adding any distinctive theory.

Next will be considered how the courts have treated this problem in states having "compulsory" Acts.

In New York, where the Act contains "compulsory" provisions relative to "hazardous" employments, the leading case is *Matter of Post v. Burger & Gohlke*.<sup>54</sup> There the contract of employment was made in New York where the employee worked regularly; the injury occurred in New Jersey on a temporary job. The New York Act was held to apply. By construing the whole Act, the court found it to have been the intention of the legislature "to require that in every contract of employment in the cases provided by the Act, there should be included and read into the contract the provisions of the Act, and that such provisions should be applicable in every case of injury wherever the employee is

<sup>51</sup>State ex rel Maryland Casualty Co. v. District Court, (1918) 140 Minn. 427, 168 N. W. 177, noted in 28 Yale L. Journ. 189; Stansberry v. Monitor Stove Co., (1921) 150 Minn. 1, 183 N. W. 977, 20 A. L. R. 316; Krekelberg v. M. A. Floyd Co., (1926) 166 Minn. 149, 207 N. W. 193, noted in 24 Mich. L. Rev. 738.

<sup>52</sup>Smith v. Heine Safety Boiler Co., (1921) 119 Me. 552, 112 Atl. 516. The contract was made in Massachusetts; the injury occurred in Maine. The employee was a resident of New York; the employer was a foreign corporation. The claimant had applied for compensation in New York, where the New York Act was held not to apply. (Smith v. Heine Safety Boiler Co., *infra* note 58.) In holding the Maine Act to apply, the court pointed out that the employer was carrying on business in Maine at the time of the accident, and such business was not of a casual or transitory character within the meaning of the Act. The New York decision did not preclude the claimant since the New York court did not adjudicate upon the merits.

<sup>53</sup>McGuire v. Phelan-Shirley Co., (1924) 111 Neb. 609, 197 N. W. 615, noted in 3 Neb. L. Bull. 295. The contract was made in Nebraska for work to be performed in Iowa where the injury occurred. The employee was a resident of Nebraska, and the employer's principal place of business was there. The Nebraska Act was held to apply. The court said the Act "should be so construed that technical refinements of interpretation will not be permitted to defeat it."

<sup>54</sup>(1916) 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B 158, 10 N. C. C. A. 888, noted in 3 Va. L. Rev. 552.

There is an earlier case which was decided upon a construction of a provision of the Act as to a special situation. *Edwardsen v. Jarvis Lighterage Co.*, (1915) 168 App. Div. 368, 153 N. Y. S. 391.

One of the cases applying the rule of the *Post* case is *Holmes v. Communipaw Steel Co.*, (1919) 186 App. Div. 645, 174 N. Y. S. 772.

engaged in the employment." Two later cases,<sup>55</sup> decided without opinion, seem to extend the rule of the *Post Case* to situations where the work contemplated by the contract was entirely outside the state.<sup>56</sup> However, cases in the lower courts throw some doubt upon this.<sup>57</sup> A slight limitation was made in *Smith v. Heine Safety Boiler Co.*<sup>58</sup> There the contract was made in New York but before there was any Act in New York. Also no hazardous business was carried on by the employer in New York at the time of the accident abroad. In fact, the plant was moved before the Act was passed. The New York Act was held not to apply. The court said that when the accident happened, the employer "was subject to no duty to insure its employees under our law, except, indeed, such employees as it might send within our state." Judge Cardozo, in describing the nature of the liability under the Act used the unfortunate term "*quasi ex contractu*." But he went on in excellent vein:

"Contractual in a strict sense, of course, the liability is not. If the parties were to agree that it should not attach, the courts would disregard their agreement. A duty is imposed by law on employers conducting a hazardous employment in New York to insure their workmen against injury, and the insurance covers injuries incidental to that employment though suffered in another state. The contract creates the relation to which the law attaches the duty, and the same law which imposes the duty defines its orbit and its measure."

From these cases, it follows that there can be no recovery under the Act when the contract was not made in New York and the injury was abroad.<sup>59</sup> The test, as it now seems to be,

<sup>55</sup>*Klein v. Stoller & Cook Co.*, (1917) 220 N. Y. 670, 116 N. E. 1055; *Fitzpatrick v. Blackall & Baldwin Co.*, (1917) 220 N. Y. 671, 116 N. E. 1044.

<sup>56</sup>Support for this is also found in *Matter of Hospers v. Hungerford-Smith Co.*, (1921) 230 N. Y. 616, 130 N. E. 916, also decided without opinion. See also *Minto v. Hitchings & Co.*, (1923) 204 App. Div. 661, 198 N. Y. S. 610.

<sup>57</sup>*Gardner v. Horseheads Const. Co.*, (1916) 171 App. Div. 66, 156 N. Y. S. 899. That case is commented upon in: *Minto v. Hitchings & Co.*, (1923) 204 App. Div. 661, 198 N. Y. S. 610; *Thompson v. Foundation Co.*, (1919) 188 App. Div. 506, 177 N. Y. S. 58; *Royal Indemnity Co. v. P. & W. Refining Co.*, (1917) 98 Misc. 631, 634, 163 N. Y. S. 197.

Also in *Perlis v. Lederer*, (1919) 189 App. Div. 425, 178 N. Y. S. 449, the Act was held not to apply where the contract was made in New York for services to be performed wholly in another state. The court said that such a contract "is without the police power of the state of New York." *Contra*, *State Industrial Commission v. Barene*, (1919) 197 Misc. 486, 177 N. Y. S. 689.

<sup>58</sup>(1918) 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D 316.

<sup>59</sup>*Thompson v. Foundation Co.*, (1919) 188 App. Div. 506, 177 N. Y. S. 58.



recently has been thus expressed,<sup>60</sup> "whether at the time of the accident the employer was carrying on a hazardous employment within the state of New York, and whether the claimant suffered an injury incidental to that employment, though suffered in another state." The decisions in the other recent cases<sup>61</sup> follow from what is said above.

The courts of Ohio<sup>62</sup> and North Dakota<sup>63</sup> also have dealt with this problem under "compulsory" Acts.

To summarize, the courts have been faced again and again with the task of determining whether the local Act applies in a given situation. In determining that question, there is properly no difficulty when the Act is explicit with regard to that particular situation. But when the Act is not explicit, the problem becomes one of interpretation. To aid them, the courts naturally have turned to analogies to be found in the general body of the law of Conflict of Laws.

It may be conceded that, subject to possible constitutional limitations, the legislature *could* provide for the extension of the operation of the Act to matters having no connection with that jurisdiction, and that such a provision would be binding upon the courts of that jurisdiction. But in the absence of such an express provision, in view of orthodox Anglo-American theories of the territorial scope of the law of a particular jurisdiction, it is not

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<sup>60</sup>*Donohue v. Robertson Co.*, (1923) 205 App. Div. 176, 199 N. Y. S. 470.

<sup>61</sup>See *Baggs v. Standard Oil Co.*, (1920) 180 N. Y. S. 560; *Maddens v. Fox Film Co.*, (1923) 205 App. Div. 791, 200 N. Y. S. 344.

<sup>62</sup>In *Industrial Commission v. Ware*, (1919) 10 Ohio App. 375, the employer was a contractor of Ohio, and was a member of and participant in the state insurance fund of Ohio; the injury occurred in Kentucky. No averment was made that the contract was made in Ohio or that the labor was to be performed there. The Ohio Act was held not to apply. The court said that to come within the policy of the statute, the claimant must be an Ohio workman and must be either employed in Ohio or employed to work there. The court regarded the decision of the supreme court in this case (98 Ohio St. 458) as implying that the Act may apply where the contract is made in Ohio for work partly or primarily in Ohio and the injury occurs while the workman is temporarily or casually out of the state.

<sup>63</sup>In *Altman v. North Dakota Workmen's Compensation Bureau*, (1923) 50 N. D. 215, 195 N. W. 287, 28 A. L. R. 1337, the contract was made in North Dakota for labor to be performed in Washington where the injury occurred. The North Dakota Act was held not to apply. The court stressed the fact that the employment in Washington was not merely incidental to employment in North Dakota. The court said:

"The state, through the bureau, makes the necessary levies, called premiums, on employers, collects the fund, using the governmental machinery for the purpose, and disburses the same to employees within the law. There is nothing contractual in connection with the creation of the fund or the payment of benefits thereunder."

surprising that the courts have sought to find some act or relation within the jurisdiction to which the Act will attach legal consequences. However, in determining what it is to which those legal consequences will be attached, the courts have differed. Which view is the best the writer does not say. A suggestion as to the proper explanation of the cases holding the local Act to apply, with varying limitations, when the contract of employment is made within the jurisdiction and the injury occurs abroad is offered. Where the Act is compulsory, the view taken by the New York and California courts that the Act imposes incidents upon the relation created by the contract which contract is under the control of the state is entirely sound.

With regard to the elective Acts, the cases under them must rest upon substantially the same basis. The fictional nature of the theory that there is a contract to come within the Act in the sense of a consensual undertaking with the other requisites of a contract already has been discussed.<sup>64</sup> The only tenable theory, it is submitted, is that well expressed by the Wisconsin court:<sup>65</sup>

"Neither, in our opinion, does the fact that the law has an elective feature and is not compulsory materially affect the question. . . .

"The liability of the employer under the Act being statutory, the Act enters into and becomes a part of every contract, not as a covenant thereof, but to the extent that the law of the land is a part of every contract."

The attitude of the court in construing the Act is also enlightening. It pointed out that the language of the Act did not expressly nor by necessary implication limit its operation to injuries occurring in the state; hence the legislative intent could be ascertained by a consideration of the legislative purpose, including the economic policy back of the Act that an industry bear its own losses through injuries regardless of state lines.

#### IV. THE EFFECT OF THE RECEIPT OF COMPENSATION UNDER THE ACT OF ONE JURISDICTION UPON A RECOVERY UNDER THE ACT OF ANOTHER JURISDICTION

The cases discussed under the preceding heading have shown the possibility of the courts of two or more jurisdictions holding their own Act to apply to the same injury.<sup>66</sup> Suppose that com-

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<sup>64</sup>See text to note 49.

<sup>65</sup>*Anderson v. Miller Scrap Iron Co.*, (1919) 169 Wis. 106, 113, 115, 170 N. W. 275, 171 N. W. 935.

<sup>66</sup>See Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 Harv. L. Rev. 533, 542.

pensation payments are made under the Act of one state, and later an award is made under the Act of another state. What will the courts and administrative tribunals of the latter state do about such payments?

This problem has arisen in the courts of New York and has been disposed of cursorily. In *Jenkins v. Hogan & Sons, Inc.*,<sup>67</sup> the contract of employment was made in New York, and the injury occurred in New Jersey. The claimant had accepted ninety dollars under the New Jersey Act and had executed an affidavit of release. The New York Act was held to apply, and the receipt and release not to bar recovery. Provision, however, was made for the filing of the affidavit as a receipt for the payment of ninety dollars. A further step was taken in *Gilbert v. Des Lauriers Column Mould Co.*,<sup>68</sup> in which the contract was made in New York and the injury occurred in New Jersey. The claimant made application for compensation under the New Jersey Act and received some payments thereunder. Later an award was made in New York crediting the insurance carrier with the amount paid under the New Jersey proceeding. In affirming the award, the court said that the New Jersey Proceeding did not deprive the New York commission of jurisdiction. In fact, the court expressed doubt whether the New Jersey commission ever had jurisdiction of the case. A limitation upon this doctrine was made in *Minto v. Hitchings & Co.*<sup>69</sup> There the claimant hired out in New Jersey with an employer who carried on his principal business there. The injury occurred in New York. The claimant applied for and was awarded compensation under the New Jersey Act. Later he was awarded compensation under the New York Act with deductions for the amounts paid under the New Jersey proceedings. The appellate division, apparently assuming that the New York Act applied, reversed the award on the ground that the claimant was estopped from seeking like redress in New York. This case was itself limited to its facts in a most confusing opinion in *Anderson v. Jarrett Chambers Co.*,<sup>70</sup> where the findings of the board were that the contract was made in New York, the principal place of business of the employer, and the injury occurred in New Jersey. The acceptance of compensation under the New Jersey Act was said not to bar a claim for com-

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<sup>67</sup>(1917) 177 App. Div. 36, 163 N. Y. S. 707.

<sup>68</sup>(1917) 180 App. Div. 59, 167 N. Y. S. 274.

<sup>69</sup>(1923) 204 App. Div. 661, 198 N. Y. S. 610.

<sup>70</sup>(1924) 210 App. Div. 543, 206 N. Y. S. 458, noted in 10 Cornell L. Quart. 364.

pensation under the New York Act. Final disposition of the case was not made, however.<sup>71</sup>

In connection with this matter, a dictum of the New Jersey court in *Rounsaville v. Central R. R. Co.*<sup>72</sup> is of interest:

"It is enough for the present to say that recovery of compensation in two states is no more illegal, and is not necessarily more unjust than recovery upon two policies of accident or life insurance."

#### V. THE EFFECT OF THE LOCAL ACT OR THE ACT OF ANOTHER JURISDICTION UPON A COMMON-LAW ACTION FOR DAMAGES OR SOME OTHER ACTION NOT BASED UPON A WORKMEN'S COMPENSATION ACT

Under this heading cases in which other matters are involved will not be considered. Those cases will be left to be stated under the next heading.

Except in the North Carolina cases, which will be considered presently, it uniformly has been held that any other form of relief will be denied if the plaintiff has a remedy under the Act of another jurisdiction.<sup>73</sup> The theories used in determining whether the Act of the other jurisdiction applies are as numerous

<sup>71</sup>The award was reversed and the claim remitted to the board because of insufficiency of the record to sustain the findings. No mention was made of crediting the sums paid under the New Jersey Act, but such a statement was not called for as the case was presented to the court. For the subsequent disposition of the case, see (1925) 215 App. Div. 742, 212 N. Y. S. 765, affirming an award in favor of the claimant, affirmed in (1926) 242 N. Y. 580, 152 N. E. 435.

<sup>72</sup>(1915) 87 N. J. L. 371, 374, 94 Atl. 392. For the subsequent disposition of this case see note 33, *supra*.

<sup>73</sup>Cases involving the Acts of foreign countries are: *Beyer v. Hamburg-American S. S. Co.*, (C.C. N.Y. 1909) 171 Fed. 582; *Schweitzer v. Hamburg Am. Line* (1912) 78 Misc. 448, 138 N. Y. S. 944; *The Falco*, (D.C. N.Y. 1926) 15 F.(2d) 604.

Some of the cases involving the Acts of other states in this country are: *Shurtliff v. Oregon Short Line R. Co.*, (Utah 1925) 241 Pac. 1058; *Albanese v. Stewart*, (1912) 78 Misc. 581, 138 N. Y. S. 942; *Wasilewski v. Warner Sugar Refining Co.*, (1914) 87 Misc. 156, 149 N. Y. S. 1035; *Pendar v. H. & B. American Mach. Co.*, (1913) 35 R. I. 321, 87 Atl. 1, L. R. A. 1916A 428, 4 N. C. C. A. 600; *Bonner v. Tucker Stevedoring Co.*, (1916) 25 Pa. Dist. Rep. 600; *Bozo v. Central Coal & Coke Co.*, (1920) 57 Utah 243, 193 Pac. 1111.

*A fortiori*, the same is true when the local Act applies to the injury. *Anderson v. Miller Scrap Iron Co.*, (1919) 169 Wis. 106, 170 N. W. 275, 171 N. W. 935. In *St. Louis-San Francisco R. Co. v. Carros*, (1922) 207 Ala. 535, 93 So. 445, the contract was made in Alabama; the injury occurred in Mississippi. This was an action for damages. The Alabama Act provided for compensation for injuries abroad when the contract was made in Alabama unless there was an express provision to the contrary in the contract. Judgment was rendered for the plaintiff. This judgment was affirmed on the ground that there was no pleading to raise the question of the effect of this provision of the Act.

as those used in determining the application of the local Act. Thus in *Johnson v. Nelson*,<sup>74</sup> the contract of employment apparently was made in Minnesota to be performed in Wisconsin; the injury occurred in Wisconsin, the Act of which the employer expressly had "accepted". Recovery in a common-law action for damages was denied on the ground that the sole remedy open to the plaintiff was under the Wisconsin Act. The Minnesota court invoked the rule that matters pertaining to the performance of contracts are governed by the law of the place of performance, the rule that liability for torts is governed by the law of the place where the injury is inflicted, and the "acceptance" of the Wisconsin Act by the employee by failure to give written notice of non-acceptance. A most interesting case is *Barnhart v. American Concrete Steel Co.*<sup>75</sup> There the contract was made in New Jersey with a New Jersey corporation; the injury occurred in New York. An action for wrongful death was brought in New York, and recovery was denied. The New York Wrongful Death Statute applied only when the person killed had a common-law action. The court reasoned that under the New Jersey "optional" Workmen's Compensation Act, there was a contract in the strict sense under which the statutory scheme of compensation was substituted for the common-law remedies. This contract, not being opposed to the public policy of New York, barred this action.<sup>76</sup>

The cases in North Carolina, which has no Workmen's Compensation Act, require special treatment. In *Farr v. Babcock Lumber Co.*,<sup>77</sup> the contract was made in Tennessee; the injury occurred in North Carolina. This was a common-law action for damages. The defendant contended unsuccessfully that the contract was subject to the provisions of the Tennessee Act and that the North Carolina court had no jurisdiction. The court said:

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<sup>74</sup>(1915) 128 Minn. 158, 150 N. W. 620.

<sup>75</sup>(1920) 227 N. Y. 531, 125 N. E. 675. The opinion in the appellate division is noted in 18 Col. L. Rev. 377.

<sup>76</sup>An easier case reaching the same result is *Prdich v. N. Y. Cent. R. Co.*, (1920) 111 Misc. 430, 183 N. Y. S. 77. The contract was made in New Jersey, and the death occurred there. The New Jersey Wrongful Death Statute also applied only where the decedent would have had an action for damages if he had lived.

A similar case is *Anderson v. Standard Oil Co. of N. J.*, (1925) 124 Misc. 829, 209 N. Y. S. 493. There the contract was made in New Jersey; the injury occurred on the Hudson River, death resulting in New Jersey. Suit was brought upon the New Jersey Death Statute. The complaint was dismissed on the ground that the sole remedy was under the New Jersey Workmen's Compensation Act.

<sup>77</sup>(1921) 182 N. C. 725, 109 S. E. 833.

"As now advised, especially in the absence of an opposing interpretation by the supreme court of Tennessee, we are of opinion that the sections of the Workmen's Compensation Act cited and relied on by the defendant do not purport to interfere with the jurisdiction" of the North Carolina court.

In a recent case, *Johnson v. Carolina C. & O. Ry. Co.*,<sup>78</sup> the same court went even further. In that case not only was the contract made in Tennessee, but the injury occurred there. In holding that the plaintiff could maintain a common-law action for damages in North Carolina, the court used this strange language:

"To hold that a citizen of this state, under such circumstances, had no remedy except that provided by the Tennessee Compensation Act in force in the state in which he was injured, having been induced to go there to work in an emergency, would be a denial of any remedy in the courts of this state. This court cannot so hold."

Of course, where the court finds that the Act of another jurisdiction<sup>79</sup> or of its own<sup>80</sup> does not apply to the injury, other relief will be granted.

#### VI. THE EFFECT OF THE LOCAL ACT OR THE ACT OF ANOTHER JURISDICTION AND OTHER FACTORS UPON A COMMON-LAW ACTION FOR DAMAGES OR SOME OTHER ACTION NOT BASED UPON A WORKMEN'S COMPENSATION ACT

Under this heading will be stated without comment a number of cases which show how complex are some of the questions which have arisen.

The fact that a plaintiff had received payments under the Act of Illinois, in addition to a finding that the Illinois Act applied to the injury aided a Missouri court in denying recovery in a common-law action for damages.<sup>81</sup>

Three interesting cases are of sufficient similarity to be considered together. In *Hartford Acc. & Indem. Co. v. Chartrand*,<sup>82</sup> the employment and injury were in New Jersey. Under the New Jersey Act, the employee was paid certain amounts by the plain-

<sup>78</sup>(N.C. 1926) 131 S. E. 390, noted in 40 Harv. L. Rev. 130. With regard to another phase of this case, see the text to note 15.

<sup>79</sup>*Marra v. Hamburg-Am. P. A. Gesellschaft*, (1917) 180 App. Div. 75, 167 N. Y. S. 74.

<sup>80</sup>*Hamm v. Rockwood Sprinkler Co.*, (1916) 88 N. J. L. 564, 97 Atl. 730; *Reynolds v. Day*, (1914) 79 Wash. 499, 140 Pac. 681, L. R. A. 1916A 432, 5 N. C. C. A. 814; *Cogliano v. Ferguson*, (1917) 228 Mass. 147, 117 N. E. 45.

<sup>81</sup>*Mitchell v. St. Louis Smelting & Refining Co.*, (1919) 202 Mo. App. 251, 269, 215 S. W. 506.

<sup>82</sup>(1924) 239 N. Y. 36, 145 N. E. 274, noted in 25 Col. L. Rev. 383, 34 Yale L. Journ. 441, 10 Cornell L. Quart. 364, 366.

tiff insurance company. Later the employee sued in New York the third person who had caused the injury, and recovered judgment. Prior to the payment of the judgment, a statement of the compensation agreement was filed with the judgment debtor. Under the New Jersey Act, the insurance company then became entitled to receive from such third person a sum equivalent to the compensation payments. The money paid on the judgment being in New York under the jurisdiction of the supreme court, it made an order impressing an equitable lien on the proceeds of such judgment. This order was affirmed by the court of appeals on the ground that the common-law action for negligence arising in New Jersey was limited by this provision of the Act. The court was careful to say that there was no statutory lien. Instead, said the court:

"The employee will be presumed to have received the money from the third party for the purpose of doing that which in law and good conscience he ought to do—return so much of it as he has received in advance under the Workmen's Compensation Law of New Jersey, from his employer or the insurance carrier.. Equity will impress upon the funds a lien in order to accomplish this purpose."

A slightly different situation was presented in *Reutenik v. Gibson Packing Company*.<sup>83</sup> There the employer was a corporation having its principal place of business in California. The employee was fatally injured by the defendant in Washington. The widow received in California an award for compensation of \$5,000. In this action, the personal representative of the deceased sued under the Washington Wrongful Death Statute, and the suit resulted in a verdict and judgment for \$9,000. The judgment awarded a lien thereon against the interest of the widow to the extent of the sum paid by the insurance company under the California award. The California Act provided for such a lien. In affirming the judgment, the court said that the California Act and the construction thereof were part of the contract of insurance, and that the provision for a lien in the California Act was not prohibited by any law of Washington.

Another variation is found in *Rorvik v. Northern Pac. Lumber Co.*<sup>84</sup> There, apparently the contract was made in California; the death occurred in Oregon. The widow brought an action under the Oregon Employers' Liability Statute against the third person, the servants of which caused the death, and recovered a

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<sup>83</sup>(1924) 132 Wash. 108, 231 Pac. 773.

<sup>84</sup>(1921) 99 Ore. 58, 190 Pac. 331, 195 Pac. 163.

judgment for \$12,500. The defendant set up as a bar to the action an award of compensation of \$5,000 in California against the employer of the deceased. An appeal from the award was pending in California. Under the California Act, the making of such a claim operated as an assignment to the employer of the claimant's rights against third persons, subject to a duty in the employer to pay to the claimant any amount recovered in excess of the amount paid by the employer on the award. The judgment was affirmed on the theory that at the least the claimant was part owner of the cause of action and as such could sue on the refusal of the employer to do so, and that the employer was precluded from suing.

No better case with which to close this paper can be found than *Anderson v. Miller Scrap Iron Co.*,<sup>85</sup> not only because of the complexity of the questions involved, but also because of the clarity of thought shown in the opinion. In that case, the contract of hire was made in Wisconsin; the injury occurred in Michigan. The action, based upon the Michigan survival statute, was brought by the administratrix of the estate of the decedent against the employer and its officer, one Miller, who caused the death. The plaintiff recovered a judgment for damages which was reversed on the ground that the Wisconsin Act governed the liability arising out of the injury.<sup>86</sup>

The subsequent history of the case is of interest. After the judgment was reversed, on remittitur, a motion was made to dismiss the action as to both defendants. No objection was made as to the employer, but both the plaintiff and the employer objected to the dismissal of Miller. But the motion was granted, and the employer appealed. In the meantime the widow secured an award for compensation under the Wisconsin Act.<sup>87</sup> On its appeal<sup>88</sup> the employer claimed to have acquired this cause of action against Miller by virtue of a provision in the Wisconsin Act for assignment of tort actions after compensation was claimed. It was held that there could be no recovery as such assignee. The court said:<sup>89</sup>

"It is beyond the power of the legislature of this state to divert this action from the plaintiff administratrix. . . . To attribute

<sup>85</sup>(1919) 169 Wis. 106, 170 N. W. 275, 171 N. W. 935.

<sup>86</sup>For the cogent reasoning of the court see the text to note 65.

<sup>87</sup>Affirmed on appeal in *Miller Scrap Iron Co. v. Boncher*, (1921) 173 Wis. 257, 180 N. W. 826.

<sup>88</sup>*Anderson v. Miller Scrap Iron Co.*, (1922) 176 Wis. 521, 182 N. W. 852, 187 N. W. 746.

<sup>89</sup>(1922) 176 Wis. 521, 532.



power to our legislature to thus interfere with a cause of action springing from the statutes of another state is to accord to the enactments of the legislature of this state extraterritorial effect. It is beyond the power of the legislature of this state to provide that one person can assign a cause of action which belongs to another, or that any act on the part of one shall operate as an assignment of a cause of action arising under the laws of a sister state, and which the statutes of that state vest in another."

### CONCLUSION

A few suggestions for improvement with regard to some of the problems discussed above will conclude this paper.

As to the scope of the Act of a particular jurisdiction, there is need for legislative definition. The attempts of the courts to work this out by the use of common-law analogies has produced theoretical absurdities and practical harm because of uncertainty. The latter aspect of the situation is shown by the vast amount of litigation on the matter in the appellate courts alone. What the legislative definition should be, the writer does not attempt to say. But the main desideratum should be certainty<sup>90</sup> so that employers may arrange insurance and other matters accordingly, and so that needless litigation may be prevented. Uniform legislation on the subject should be the ultimate aim.<sup>91</sup> Workmen's compensation is of purely statutory origin, and therefore it is not unreasonable to ask for further legislation on this phase of such Acts.

Another possible tool for improvement, suggested by the Anglo-French convention,<sup>92</sup> is interstate agreements with the con-

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<sup>90</sup>A model of clearness and definiteness is the Pennsylvania Act:

"This Act shall . . . apply to all accidents occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and shall not apply to any accident occurring outside of the Commonwealth." Pa. Laws 1915, Act. no. 338, art. 1, section 1.

It is not without significance that no cases have been found involving the construction of that section.

<sup>91</sup>The Act proposed by the National Conference of Commissioners on Uniform State Laws contains some useful suggestions in this and other problems discussed in this paper. See particularly sections 4, 42.

<sup>92</sup>This agreement deals with the recovery of compensation where British subjects are injured in France and vice versa. This convention is attached as a schedule to a statute, 9 Edw. 7, c. 16, authorizing the effectuation of the convention by Order in Council. The order has been made. See Elliott, *Workmen's Compensation Acts*, 8th ed., p. 689. For the arrangements made for payment, see Knowles, *Law Relating to Workmen's Compensation*, 4th ed., p. 459.

The amending Act of 1923 has facilitated like conventions with other countries. 13 & 14 Geo. V, c. 42, s. 26 (1). Provision is made for Orders in Council to effectuate future conventions.

sent of Congress under the "compact" clause of the federal constitution.<sup>93</sup>

The same methods of improvement may be used to advantage with regard to the problem of enforcing in one jurisdiction a right to compensation arising under the Act of another jurisdiction.<sup>94</sup>

Perhaps the easiest and most needful reform is with regard to deductions for the receipt of compensation or the recovery of damages in another state. Just as are the New York cases<sup>95</sup> which allow deductions for payments of compensation under the Act of another state, they are hard to support theoretically since in theory the two claims are upon separate and distinct statute-created rights.<sup>96</sup> Hence no question of *res judicata* in any accurate sense is involved.<sup>97</sup> Here again the same methods of reform are available. In fact, legislation upon this matter is not unknown.<sup>98</sup>

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<sup>93</sup>Art. I, sec. 10. As to the use of that expedient in other fields, see Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *Yale L. Journ.* 685; Chafee, *Interstate Interpleader*, 33 *Yale L. Journ.* 685, 727.

<sup>94</sup>See the provision in section 42 of the Act proposed by the National Conference of Commissioners on Uniform State Laws.

<sup>95</sup>See text to footnotes 67, 68, 69, 70, 71.

<sup>96</sup>Perhaps the Act of a particular jurisdiction might be construed to limit the claimant to the recovery of a certain amount in whatever manner derived. The writer is indebted to Professor Beale for this suggestion. Such a construction would be unnecessary, of course, if there were express legislation or interstate agreement upon the matter.

<sup>97</sup>But see 10 *Cornell L. Quart.* 364, 366.

<sup>98</sup>See Ga. Laws 1920, Act. no. 814, sec. 37; Md. Laws 1922, ch. 529. Both of these provisions relate to the recovery of damages as well as the receipt of compensation.